IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No. 1382-SB of 2006

Date of Decision: November 29, 2007

Nachhatro

Appellant

VERSUS

State of Punjab

Respondent

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Rajiv Verma, Advocate,
for the appellant

Mr.Arvind Mittal, Additional, A.G.Punjab

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RANJIT SINGH J.

Another case under the Narcotics Drugs and Psychotropic Substances Act (NDPS Act), which apparently is not properly investigated, leading to the result that is to follow. In far too many cases, it is noticed that the police resort to very casual investigations into such serious cases as a result of which undue benefits accrue to the persons accused of serious offences under the

Act. There may be a need to streamline and regulate the manner or mode of investigation. It is noticeable that generally similar or identical pleas are raised in various cases for acquittal in such cases. Inmajority of the cases, the plea of conscious possession or violation of statutory or mandatory provisions of the NDPS Act are raised. It is not understood as to why the police would not follow such provisions or otherwise properly investigate the source of contraband so that aspect of possession or the accused being in conscious possession, is properly investigated. There is a need for some comprehensive directive to ensure meaningful and proper investigation. Leaving this aside, let us notice the facts in the present case which are as under:-

ASI Jaswinder Singh,(PW2) while going in a government Gypsy along with the police party, by chance, happened to effect this recovery. On 23.9.2004, he was proceeding from Rohti Bridge to Rohti Chhana. When the vehicle reached near the house of one Ajmer Singh, a woman was seen running away on seeing the Gypsy. This aroused suspicion in the mind of PW-2. He followed the lady, who had entered into a house. Police party also followed her to the house concerned and noticed the lady fending/pushing two bags lying under the cot. The bags were seen lying with mouth open and poppy husk was found scattered on the ground. The lady was accordingly apprehended. On enquiry, she disclosed her name as Nachhatro wife of Desu, Sainsi, resident of Rohti Channa. Kahan Singh son of Surjit Singh resident of village Mandaur, in the meantime, reached at the spot. The lady accused was apprised of her right while being disclosed that bags were required to be searched and if she so desired, the search could be carried out in the

presence of a gazetted officer or magistrate. She, however, agreed to be searched by ASI Jaswinder Singh. Consent Memo Ex.PB was prepared and search was accordingly conducted. Both the bags were found containing poppy husk which, on being weighed, was found to be 35 kgs. and 32 kgs. in two bags. Two samples, weighing 250 gms. each, were separated from the two bags each. The samples were sealed with the seal bearing 'JS' of ASI Jaswinder Singh. The bags were taken into possession through recovery Memo Ex.PC. Sample seal, Ex.PA , was separately prepared. The personal search of the lady was also carried out and she was taken into custody. Her husband Desu was informed about the arrest. Intimation was also sent to higher authorities. Ruqa was sent to Police Station and formal FIR Ex.PD was registered. The appellant Nachhatro, along with the case property, was produced before SHO/Inspector Harbhajan Singh of Polise Station Sadar, Nabha. The case property was deposited with MHC. On the following day, the case property was produced before the Illaqa Magistrate and inventory of the same was prepared in presence of the Magistrate. Samples were sent for analysis to Chemical Examiner. On receipt of the report, challan was presented. Upon trial, the appellant was found guilty of the offence under Section 15 of the NDPS Act and sentenced to suffer RI for ten years coupled with fine of Rs.One lac. Appellant was also directed to undergo two years R.I. in default of payment of fine.

The case of the prosecution was mainly supported by ASI Jaswinder Singh and other police witnesses. Independent witness Kahan Singh was given up as having been won over. The appellant,

when examined under Section 313 Cr.P.C, pleaded her innocence besides urging that nothing was recovered from her possession and she had been falsely implicated in this case.

Counsel for the appellant has raised manifold pleas in support of the case of the appellant. Counsel would first contend that prosecution failed to establish that the house from which this recovery was effected, was in exclusive possession of the appellant. Counsel would also plead violation of provisions of Section 50 (4) inasmuch as the appellant, who was a lady, was not searched by lady constable. The search and recovery in this case was by ASI Jaswinder Singh and the case is not supported by any witness who could be termed as an independent. The one independent person, joined as a witness, was not examined as having been won over. He was thus given up. Plea is also made that the link evidence is totally missing in this case besides strongly urging that seal in this case, after use remained with the Investigating Officer. Accordingly, it is pleaded that it would be rather unsafe to maintain the conviction in this case in view of so many infirmities in the case of prosecution as noticed above.

As already noticed, prosecution in this case would mainly depend upon the version given by ASI Jaswinder Singh,(PW-2). He gave out the manner in which he happened to see the appellant running away on seeing the police vehicle. PW-2 further deposed that he had followed her when she had entered into her house, which led to recovery of two bags of poppy husk. Having given the account of the manner of recovery etc., PW2 deposed that the property was sealed with his seal bearing impression 'JS'.

In order to bring home the charge against the appellant, the prosecution was required to prove that the house, from where the recovery was effected, was either in possession of the appellant, and to be more precise, in the exclusive possession of the appellant. This was essential to burden the appellant with recoveries being from his conscious possession. PW-2 conceded that the house was a residential house. When questioned, he testified that Panch or Sarpanch of the village were called but no one turned up. He further conceded that there was over writing on the sample parcel. As per PW2 no one was present in the house at the time of recovery and the appellant alone was there present. Initially PW2 did state that the seal after used was handed over to Kahan Singh, independent witness, but he immediately disclosed thereafter that the seal was handed back to him after 2/3 days. His exact version in this regards reads " Kahan Singh met us on Rodhi bridge after 2/3 days and handed over my seal to him". PW-2 was then given a suggestion that Kahan Singh was not present at the spot. He, however, denied the same. The action of PW2 in handing the seal to independent witness, if he was present, would clearly indicate that he was aware and conscious about the requirement of not keeping a seal with him so that any allegation of tampering of the sample seal is ruled out. If that be so, then PW-2 cannot offer any justification for taking the seal back from the independent witness after 2/3 days. Concededly samples have not been sent when the seal was taken back by PW-2 from the independent witness. It will not be un-reasonable to urge that either Karhan Singh was not present at the time of recovery and the seal had remained with PW-2 only who came out with the story

projected by him of handing over of the seal back by Kahan Singh. This can be said to be a made up story. Even if that be not so still the justification of taking the seal back after 2/3 days and before the samples were sent, would go to nullify the entire requirement or effect of handing over the seal to an independent witness. Needless to mention that this requirement is only to ensure and to rule out the possibility of tampering of the samples. This essential requirement to lend assurance to prosecution case is thus found wanting.

Kahan Singh, independent witness, having been given up, would leave the case totally to seek support from the version of the police witnesses. Search in this case was conducted by ASI Jaswinder Singh alone and not in the presence of any gazetted officer to lend some semblance of assurance to the said search and the recovery. The evidence on record would show that no efforts were made by PW-2 to establish that this house was owned or possessed by the appellant. It is on record that the appellant is a married lady and her husband was also informed about the arrest of the appellant. Obviously that means that the husband was staying in the same house. The house having not been proved to be in exclusive possession or in the ownership of the appellant, can obviously lead to an inference that the contraband was not in the conscious or exclusive possession of the appellant. The possibility cannot be ruled out that her husband or any other occupant of the house had brought this contraband even if recovery is taken to be in the manner as is alleged. The prosecution was bound to rule out this possibly to bring home the offence against the appellant under Section 15 of the NDPS Act. Case of **Sees vs. State of Punjab,**

1995 (3) RCR (16) can be referred to with advantage in this regard. This was a case of recovery of 14 bags of poppy husk from the house of an accused. Other members were also found living therein. This Court took the view that it can not be taken that the recovery was effected from the exclusive possession of the accused. There is, as such, a justification in the plea raised by the defence on behalf of the appellant.

The submission of the counsel for the appellant regarding violation of the provisions of Section 100 (4) Cr.P.C. is also not without merit. The trial Court has ignored the said provisions by saying that the police party had entered the house while chasing the appellant and as such, it is not a case of house search. It may be a chance recovery and the police had entered the premises following the lady but still it can not said that it was not a case of house search. PW-2 can not justify his act in conducting search without calling independent witness as require under Section 100(4) Cr.P.C.

The possession of the appellant is sought to be established in this case on the basis of evidence as noted above. The possession is to be determined in each case from its facts. The word as appearing in Section 15 of the Act would clearly mean physical possession besides the legal possession to bring home the offence under this Section. The possession should not only be a physical possession but a legal possession as well over the contraband to clearly establish the offence under Section 15 of the NDPS Act. It is also to be shown that appellant was in actual exclusive physical possession of the contraband, before the prosecution could seek conviction. The aspect of proving conscious

possession to seek conviction under the NDPS Act has been a subject matter of adjudication in large number of cases. The consistent view is that mere presence of a person near the contraband would not be enough to prove physical exclusive possession. It has to be established that a person is in conscious possession of the contraband. In case of ***State of Punjab Vs. Balkar Singh and another,*** 2004 Supreme Court Cases (Crl.) 838, it was held that mere presence of the accused person at a place from where bags of poppy husk were recovered itself would not be enough to bring home the offence against him. It was observed that:-

> "the presence of the respondents at the place from where the bags of poppy husk were recovered itself was taken as possession of these bags by the police. In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles. Though the respondents raised a plea before the Sessions Court, the same was not considered by the Sessions Judge in the manner in which it should have been considered. We do not think that the High Court erred in holding that there was no evidence to prove that the respondents were in conscious possession of the poppy husk recovered by the police. The prosecution failed to discharge its obligation to prove the possession of the poppy husk by the respondent."

This Court has followed this view expressed in

Balkar Singh's case (Supra), in number of cases like ***Sukhdev Singh alias Sukha Vs. State of Punjab,*** 2006 (1) RCR (Criminal) 4 and ***Bikkar Singh Vs. State of Punjab,*** 2006(3) RCR (Criminal) 16. Even in ***Avtar Singh Vs. State of Punjab,*** AIR 2002 SC 3343, it was observed by the Hon'ble Supreme Court that though the persons were found sitting on the bags, but this alone would not be sufficient proof for they being in conscious possession of the contraband. Thus the prosecution in the instant case was not able to prove that the contraband was recovered from the exclusive conscious physical possession of the appellant.

The submission made in regard to the possibility of tampering with the seal and samples also cannot be ignored. In ***Baldev Singh Vs. State of Punjab,*** 2005 (1) RCR (Criminal) 823, it is held that till the case property is dispatched to the office of Forensic Science Laboratory, these seals should not be available to prosecuting agency and in the absence of such safeguard, the possibility of the seal being tampered with, substance being changed and the container being re-sealed can not be ruled out. Again in ***Ramji Singh Vs. State of Haryana,*** 2007(3) RCR (Criminal) 452, this Court took a view that where the seal is not given to independent witness who remained with police and the samples are sent after a delay of 72 hours, then such circumstance is fatal to the prosecution. This aspect, in my view, would visit the present case rather with vigor. Here the police officer, being conscious of the fact that the seal was required to be handed over to independent witness, did so but again took the seal back, casting a serious doubt besides violating

the requisite safeguards required to be ensured in such cases. A case of ***Fateh Singh Vs. State of Haryana,*** 2006 (2) RCR (Criminal) 762 again can be referred in support of this proposition. In this case seal after use remained throughout with the police official who was working under the Investigating Officer. The possibility of seal being tampered with and substance being changed and packed containing the samples being re-sealed was held to be not ruled out in this case. Thus this infirmity in the prosecution case cannot be ignored.

Taking the cumulative effect of these infirmities into account, I am of the considered view that the prosecution has failed to prove the charge against the appellant beyond reasonable doubt. It will not be safe to maintain the conviction in this case in view of the infirmities as noted above. The present appeal is accordingly allowed. The conviction and sentence awarded to the appellant is, therefore, set-aside. The bail bonds and surety bonds, if any furnished in the trial Court, shall stand discharged.

(RANJIT SINGH)
JUDGE

November 29, 2007
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